

# THE COMMERCE CLAUSE, THE POLITICAL QUESTION DOCTRINE, AND *MORRISON*

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## INTRODUCTION

The Supreme Court's ruling in *United States v. Morrison*<sup>1</sup>—which invalidated parts of the Violence Against Women Act on federalism grounds—is one of the most significant Commerce Clause decisions in recent years for several reasons.

First, the majority opinion illuminates and clarifies the Court's view of the scope of federal power under the Commerce Clause. The Court articulates, with a little more precision than before, the limits on what is "Commerce among the States." *Morrison* accepts broad federal power when Congress regulates activities (even noncommercial activities) that cross state lines or use the channels of interstate commerce. Thus, it signaled approval of the portions of the Violence Against Women Act that federalize "crimes committed against spouses or intimate partners during interstate travel,"<sup>2</sup> and portions that regulate the "channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move."<sup>3</sup>

But when Congress uses the aggregation theory—adding up or aggregating a series of individual acts that together "affect" commerce among the states, if the activity regulated neither crosses a state line nor uses a channel or instrumentality of interstate activity—then the activity must have a "*commercial* character."<sup>4</sup> It must affect "commerce." *Morrison*, in short, tells us

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1. 529 U.S. 598 (2000).

2. S. Rep. No. 103-138, at 43 (1993). The provision is codified at 18 U.S.C. § 2261(a)(1), and the *Morrison* Court approves of it at 529 U.S. at 613-14 n.5.

3. *United States v. Lankford*, 196 F.3d 563, 571-72 (5th Cir. 1999), quoted with approval in *Morrison*, 529 U.S. at 614 n.5.

4. *Morrison*, 529 U.S. at 611 n.4 (emphasis added).

that Congress may not aggregate a series of noncommercial actions (such as carrying a gun near a school) in order to reach the conclusion that those actions affect "commerce."

Second, *Morrison* undercuts the argument that the Court should abdicate its role in federalism cases on the grounds that states can protect themselves.<sup>5</sup> This argument is treated as irrelevant because the entire *Morrison* Court (both the majority<sup>6</sup> and the dissent<sup>7</sup>) recognized that the doctrine of enumerated powers and the principles of federalism are designed, for the most part, to protect individuals not the states. Even Justice Breyer's dissent in *Morrison* acknowledged that the purpose of federalism and the purpose of the doctrine of enumerated powers are to protect individual liberty:

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.<sup>8</sup>

Chief Justice Rehnquist, for the majority, agreed. The "Framers crafted the federal system of government so that the people's rights would be secured by the division of power."<sup>9</sup>

The Framers of our Constitution anticipated that a self-interested "federal majority" would consistently seek to impose more federal control over the people and the states.<sup>10</sup> Hence, they created a federal structure designed to protect freedom by dispersing and limiting federal power. They instituted federal-

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5. The Court relied on institutional restraints to protect federalism interests in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833, 847-48 (1976). In that line of cases, however, all the Justices agreed that the matters were within the Commerce Clause. The only issue was whether the interests in state sovereignty placed some limits on federal power to regulate matters that were within interstate commerce.

6. 529 U.S. at 613-17, nn.5-7.

7. *Id.* at 655 (Breyer, J., joined by Stevens, J. dissenting), discussed below. See also Ginsburg, J., dissenting, in *Arizona v. Evans*, 514 U.S. 1, 30 (1995).

8. 529 U.S. at 655 (Breyer, J., joined by Stevens, J., dissenting). Justices Souter and Ginsburg joined only Part I-A of the Breyer dissent, and this quotation comes in an introductory, unnumbered section, shortly before Part I-A. Hence, Justices Souter and Ginsburg may not have joined this introductory portion.

9. *Id.* at 617.

10. See William T. Mayton, "The Fate of Lesser Voices": *Calhoun v. Wechsler on Federalism*, 32 Wake Forest L. Rev. 1083 (1997) (quoting *Calhoun*); cf. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311 (1997).

ism chiefly to protect individuals, that is, the people, not the "states *qua* states."<sup>11</sup>

The Framers sought to protect liberty by creating a central government of enumerated powers. They divided power between the state and federal governments, and they further divided power within the federal government by splitting it among the three branches of government, and they further divided the legislative power (the power that the Framers most feared) by splitting it between two Houses of Congress.<sup>12</sup>

*Morrison* is significant for a third reason—the rationale of Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer. That sharply worded dissent is the focus of this analysis.

The four dissenters accused the Court of ignoring precedent—a charge that is hardly unusual for a dissent. However, what is noteworthy in this case is that it is the dissent itself that seeks to overturn a long line of precedent. For the first time in two centuries, these four Justices would hold that the scope of federal power under the Commerce Clause is a political question. While the majority considers the Commerce Clause to be a major enumerated power subject to a few limitations, the dissent treats the Commerce Clause as a general power, not subject to any judicial review. This dissent, in effect, treats the other enumerated powers as surplusage.

This effort by four Justices to apply the political question doctrine to federal Commerce Clause questions and treat them as nonjusticiable is a major break with precedent. To understand the significance of this endeavor, we first must turn to the parameters of the Violence Against Women Act, which Congress passed with the best of intentions and which the Court (also with the best of intentions) invalidated as beyond federal power.

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11. In *National League of Cities v. Usery*, 426 U.S. 833, 847-48 (1976), overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court spoke in terms of federalism used to protect the states. E.g. "The Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress." But in *Morrison*, the Court recognized that the real purpose of federalism is to protect the people by dividing authority between the federal and state governments.

12. *Morrison*, 529 U.S. at 617 n.7.

## THE VIOLENCE AGAINST WOMEN ACT

In *United States v. Morrison*, the Court—by a vote of five to four—invalidated section 13981 of title 42.<sup>13</sup> This provision created a federal civil remedy for the victims of gender-motivated violence. The law was popularly called “The Violence Against Women Act,” although the sex-neutral text of the statute (which only refers to “persons”) never mentions the sex of the victim:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.<sup>14</sup>

State laws, of course, already criminalize violence whether or not the perpetrator is motivated by gender. The new federal law did not preempt such state laws. Instead, it defined a “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”<sup>15</sup> This law did not require a prior criminal conviction or even a prior criminal complaint. The civil plaintiff could file his or her cause of action in either state or federal court.<sup>16</sup>

Congress made extensive factual findings to show that the violence affects commerce, but the Court ruled that they were irrelevant to the constitutional analysis under the Commerce Clause. The Court concluded that sexual assaults—in the aggregate—do not “affect” commerce among the states because the aggregation doctrine does not apply to the effects of noncommercial conduct.

In *Morrison*, the plaintiff sued two persons who allegedly assaulted and repeatedly raped her. She could have sued in state court for the common law tort of assault and battery, but she chose to sue using section 13981. She selected a federal forum (although the federal law also authorized her to sue in state court, even though she was relying on a federal statute).<sup>17</sup>

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13. Id. at 598.

14. 42 U.S.C. § 13981(c) (2000).

15. Id. § 13981(d)(1).

16. Id. § 13981(e)(3).

17. Id. § 13981(e)(3) provides that federal and state courts “shall have concurrent

The major issue before the Court was whether this law was within the Commerce Clause given the earlier decision in *Lopez v. United States*.<sup>18</sup> In that case, a 12th grade student had carried a concealed handgun in a San Antonio high school. This act of carrying the gun already violated state law, but the Federal Government prosecuted him under federal law, the Gun-Free Zones Act of 1990. The Court overturned the conviction and held that this action was not in interstate commerce. The government had to prove some connection with interstate commerce. It was not sufficient for the government merely to prove that the student carried the handgun.<sup>19</sup>

The *Morrison* majority invalidated the Violence Against Women Act, emphasizing that it was like the law in *Lopez* because it did not regulate an economic or commercial activity<sup>20</sup> and did not have any other nexus with interstate commerce. For example, it did not regulate something that had crossed state lines or was an instrumentality of interstate commerce.<sup>21</sup> Earlier, in *Perez v. United States*,<sup>22</sup> the Court had upheld a loan-sharking law. But, said the Court, that was different: loan-sharking is an extortionate credit transaction, and loan-sharking is a commercial crime. Lending money is a "commercial" activity. Sexual battery is an unusually offensive crime, but it is not a *commercial* crime.<sup>23</sup>

Undoubtedly crime, any crime, imposes costs on society. Crime affects national productivity, and, when one aggregates the costs of individual crimes, from purse-snatching to assaults (whether gender-motivated or not), one might conclude that they all affect commerce. Another way of rephrasing that argument is to assert that, in modern times, when we measure distances by time rather than miles (Los Angeles is only a few

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jurisdiction."

18. 514 U.S. 549 (1995).

19. Ronald D. Rotunda, *Cases Refine Definition of Federal Powers*, 17 Nat'l L.J. C9, C12 (July 31, 1995).

20. 529 U.S. at 612-13.

21. See, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977) (holding that proof was required that a firearm previously traveled in interstate commerce to satisfy the required nexus between possession and commerce).

22. 402 U.S. 146 (1971). The Court upheld Title II of the Consumer Credit Protection Act, which forbade extortionate credit transactions. Only Justice Stewart dissented, on the grounds that there was no proof of interstate movement, use of the facilities of interstate commerce, or facts showing that the defendant's conduct affected interstate commerce.

23. *Morrison*, 529 U.S. at 613: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."

hours from Chicago; one can travel from New York to London on the overnight airline shuttle), *everything* is “commerce among the states” and we no longer have a government of limited or enumerated powers.

Under that theory, the Commerce Clause reaches everything, including barroom brawls. The Court has never accepted that argument in two centuries,<sup>24</sup> and all nine Justices in *Lopez* explicitly rejected it. The majority acknowledged that, “[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.”<sup>25</sup> Similarly, Justice Breyer’s *Lopez* dissent, which Justices Stevens, Souter, and Ginsburg joined, agreed that there are limits to the Commerce Clause. Although the dissent—at this point in the development of the case law—disagreed with the *Lopez* majority as to where to draw the line, all nine Justices agreed that there was a line and, ultimately, the judiciary will draw it.

Justice Breyer’s *Lopez* dissent clearly disagreed with the argument that the Court should abdicate any role. He acknowledged that there are limits to the reach of the Commerce Clause and that the Court must decide where they are. Indeed, in one intriguing paragraph, he suggested what some of these limits might be. He stated that, given the important limits on the Commerce Clause, Congress could not regulate “any and all aspects of education”:

To hold this statute constitutional is not to “obliterate” the “distinction between what is national and what is local,” nor is it to hold that the Commerce Clause permits the Federal Government to “regulate any activity that it found was related to the economic productivity of individual citizens,” to regulate “marriage, divorce, and child custody,” or to regulate any and all aspects of education.<sup>26</sup>

His choice of examples was interesting, because there is a cabinet level U.S. Department of Education and federal statutes and agency rules already regulate many aspects of education, from test taking to school lunch programs.<sup>27</sup>

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24. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935), where Cardozo, J., concurring, objects to the “view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.”

25. *United States v. Lopez*, 514 U.S. at 580.

26. *Id.* at 624 (Breyer, J., dissenting) (internal citations omitted).

27. E.g., June Kronholz, *Bringing Accountability to Schools Could Be Tough*, Wall Street Journal A24 (Jan. 23, 2001).

Though Justice Breyer did not explain what federal requirements on education, or economic productivity, or family law would be invalid, the important point is that he (and the other three Justices who joined his dissent) acknowledged that, at some point, the Court would draw the line. These four Justices disagreed with the other five as to *where* to draw the line but they all agreed that there is a line and the Court must draw it. After all, if the commerce power encompassed everything, then the considerable powers that are already enumerated in Article I, section 8 (such as the war power) are unnecessary, redundant, and superfluous, just like the preceding repetitive synonyms in this sentence.

The dissent in *Morrison* is quite different from, and in fact repudiates, the dissent in *Lopez*. The four Justices who join this dissent are the same as in *Lopez*, but this time Justice Souter is the author. Souter does not explicitly repudiate the Breyer opinion in *Lopez* but he advances a competing, diametrically opposed theory. What makes the *Morrison* dissent so unusual is that Justice Souter suggests that the Court should treat Commerce Clause questions as nonjusticiable, a political question.

In contrast to Justice Breyer, who had agreed that there are limits to the commerce power and the only issue was whether the federal law at issue was within that power, Justice Souter rejects that framework and proposes complete judicial abdication:

[The majority rejects] the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.<sup>28</sup>

Later, he reemphasizes this point: "[As to] supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics."<sup>29</sup>

And yet again the dissent underscores its unusual invocation of the political question doctrine:

Neither Madison nor Wilson nor Marshall, nor the *Jones & Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary

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28. 529 U.S. at 647 (footnote omitted) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

29. *Id.* at 649.

world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. . . . If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and *only* a political choice.<sup>30</sup>

Note that the last half of this paragraph, after the ellipses, took back what the first half appeared to have conceded.

The dissent purports to accept "history's lessons" as its guide, but that history does not suggest that the limitations on the Commerce Clause "should be a political choice and *only* a political choice." The lesson of history is the opposite.

Consider, for example, *Jones & Laughlin*,<sup>31</sup> one of the cases that Justice Souter cites. The Court did not purport to abdicate its role in adjudicating Commerce Clause issues. Instead, the Court explained why the federal law regulated commerce among the states. The New Deal Court rejected its earlier cases declaring that "manufacturing" is not commerce. The manufacturing of steel is commerce, the Court now said. Transportation of steel across state lines is concededly commerce: "of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"<sup>32</sup>

If Chief Justice Hughes were holding that the entire issue was a political question, he could have written a much shorter opinion, used the phrase "political question," and wasted no time on whether "industrial strife would have a most serious effect upon interstate commerce."<sup>33</sup> On the contrary, he warned that the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."<sup>34</sup>

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30. Id. at 651-52 n.19 (emphasis added).

31. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

32. Id. at 42.

33. Id. at 41.

34. Id. at 37.



Similarly, in *United States v. Darby*,<sup>35</sup> if the Court thought the issue were a political question, one would think that it might mention the phrase. Congress decides how far to exercise its considerable commerce power, within that power's outer bounds, but the Court decides if the statute lies outside those bounds.

In *Wickard v. Filburn*,<sup>36</sup> which the majority in *Lopez* and *Morrison* had cited with approval, one wonders why Justice Jackson's opinion dwelt on why grain consumed on the farm affects the amount of grain transported across state lines. Consumption on the farm where the wheat is grown accounts for "an amount greater than 20 per cent of average production."<sup>37</sup> "Home-grown wheat in this sense competes with wheat in commerce."<sup>38</sup> The *Wickard* Court did not blindly defer to Congress and did not abdicate its role on the decision as to whether something is within interstate commerce. Rather, it explained why transportation of wheat in commerce was "substantially affected" by home-grown wheat—a relationship that the Court concluded was neither attenuated nor implausible. *Wickard* deferred to Congress' judgment only on the question whether it should exercise this power as broadly as it did, not on the question whether the power was within the Constitution.

One significant opinion that Justice Souter's dissent did not cite was that of Justice Hugo Black in *Heart of Atlanta Motel, Inc. v. United States*.<sup>39</sup> That case upheld a federal law that prohibited motels and hotels from discriminating on the basis of race. These businesses often served transient guests moving in interstate commerce. They bought food and other goods and services that had crossed state lines. The evidence supported the conclusion that hotels and motels advertised out-of-state and accepted many of their guests from out-of-state, but refused to serve racial minorities, who therefore found it more difficult to travel in interstate commerce. It was difficult for blacks to drive across the country because many private motels and restaurants refused to serve them. The "vacancy" sign turned into "no vacancy" when the black family sought a room.

Justice Black was never a part of the pre-1937 Court that read the Commerce Clause narrowly. He had no crabbed view

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35. 312 U.S. 100 (1941).

36. 317 U.S. 111 (1942).

37. *Id.* at 127.

38. *Id.* at 128.

39. 379 U.S. 241, 268 (1964) (Black, J., concurring).

of federal power. Yet, in *Heart of Atlanta Motel*, his concurring opinion emphasized an important caveat:

[T]he operations of both the motel and restaurant here fall squarely within the measure Congress chose to adopt in the Act and deemed adequate to show a constitutionally prohibitable adverse effect on commerce. The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.<sup>40</sup>

Though Justice Black's comments were labeled a concurring opinion, there was no hint in the other opinions that any of the Justices would reject his analysis. Indeed, in the companion case of *Katzenbach v. McClung*,<sup>41</sup> the majority explicitly states: "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court."<sup>42</sup> Justice Souter's dissent is irreconcilable with *McClung* and Justice Black's concurring opinion in *Heart of Atlanta Motel*.

Perhaps Justice Souter is not arguing that all Commerce Clause issues are political questions. Souter may be saying that the reach of the Commerce Clause is determined solely by a significant national economic effect, and hence that the Court's efforts to carve-out an area of noncommercial activities and traditional areas of state concern are unwarranted. But such a criticism of the majority opinion would be off the mark. First, while the majority mentions that the activities that Congress seeks to regulate (carrying a gun near a school, a sexual assault, etc.) are areas that the states have traditionally regulated, the Court is not trying to create a list of activities that are part of "inherent" state sovereignty.<sup>43</sup> Instead, the Court makes clear that Congress may always regulate that which crosses state lines or involves the channels of interstate commerce, even if states primarily or traditionally regulate those actions.<sup>44</sup>

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40. Id. at 273.

41. 379 U.S. 294 (1964).

42. Id. at 303.

43. See, e.g., Ronald D. Rotunda, *Usury in the Wake of Federal Energy Regulatory Commission v. Mississippi*, 1 Const. Comm. 901 (1984); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289 (1984).

44. Less than a week after *Lopez*, the Court unanimously decided *United States v. Robertson*, 514 U.S. 669 (1995) (per curiam). The Government prosecuted Juan Robert-

Second, Souter may be arguing that if something is within the scope of the Commerce Clause as defined by national economic effect, then the Court's role is at an end. In Souter's view, politics and not the Constitution, decides if Congress may regulate noncommercial activity that, in aggregate, affects the entire nation, because there is no principled basis for the Court to decide if an activity is "noncommercial." But the distinction is an easy one. There conceivably may be cases where it is difficult to determine if an activity is "noncommercial," and such a case could test this theory, but that has not yet happened in over two centuries. As the *Morrison* majority pointed out, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."<sup>45</sup> The dissent was unable to undermine that conclusion. In "every case" where the Court has "sustained federal regulation under the aggregation principle in 317 U.S. 111 (1942), the regulated activity was of an apparent commercial character."<sup>46</sup>

*Lopez*, as well, spoke of the noneconomic nature of the conduct at issue. The law invalidated does not "regulate[ ] a commercial activity."<sup>47</sup> The statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>48</sup> *Lopez*, which did not overrule any prior case, assured us that, "[w]here *economic* activity substantially affects interstate commerce, legislation regu-

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son for various narcotics offenses and for violating a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) by investing proceeds of those unlawful activities in the "acquisition of any interest in, or the establishment or operations of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a) (2000). Robertson invested in a gold mine in Alaska. He was convicted on both the narcotics count and the RICO count, but the Ninth Circuit reversed the RICO count because the Government had failed to introduce sufficient evidence that the gold mine was "engaged in or affect[ed] interstate commerce." *Robertson*, 15 F.3d 862, 888 (1994).

With no dissent, the Supreme Court reversed. It was unnecessary to consider whether the activities of the gold mine "affected" interstate commerce, because the "affects" test or the "aggregation doctrine" is only necessary to "define the extent of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects." *Robertson*, 514 U.S. at 671. In this case, there was proof that money, workers, and goods crossed state lines. The activities were no longer purely intrastate. For example, Robertson purchased at least some mining equipment in California that was transported to Alaska. Robertson transported \$30,000 of gold (about 15% of the mine's total output) out of state. He also sought workers from out of state and brought them to Alaska.

45. 529 U.S. at 613.

46. *Id.* at 611.

47. *Lopez*, 514 U.S. at 551.

48. *Id.* at 561.

lating that activity will be sustained.”<sup>49</sup> The *Lopez* majority reaffirmed *Wickard v. Filburn*,<sup>50</sup> and noted that it “involved economic activity in a way that the possession of a gun in a school zone does not.”<sup>51</sup> The law in question is not even “an essential part of a larger regulation of economic activity.”<sup>52</sup>

Souter’s test as a practical matter leaves no genuine limit to the Commerce Clause. In the aggregate, every widespread activity has a national economic effect. His analysis, even limited to the aggregation theory, still makes the commerce power an unenumerated power. Recall that when people or things cross state lines or involve the instrumentalities or channels of interstate commerce, no one on the Court has a problem with a broad federal power.<sup>53</sup> Why bother with using the theory of crossing a state line or using the instrumentalities or channels of interstate commerce?

Hence, Justice Souter’s dissent in *Morrison*, in rejecting Justice Black’s view of the Commerce Clause, also rejects the Breyer dissent in *Lopez*. Yet, the same four Justices who embrace the Souter dissent are the same four Justices who join the Breyer dissent in *Lopez*. Only the main author is different. None of these Justices (Breyer, Souter, Ginsburg, and Stevens) explain, or even acknowledge, the inconsistency. The Breyer dissent in *Lopez* explicitly accepted the idea that the Federal Government is one of enumerated powers and that there are limits to the Commerce Clause, although it disagreed with the majority as to where to draw the line. In contrast, Justice Souter implicitly rejects the idea that the federal government is one of enumerated powers. Rather than disagreeing with the majority as to where the Court should draw the line, he explicitly objects to any role for the judiciary.

His proposed abdication is the first time in two centuries that any of the Justices—in this case four of them—argued that there is no significant role for the judiciary in determining the metes and bounds of the Commerce Clause.<sup>54</sup> Even in the pe-

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49. *Id.* at 560 (emphasis added).

50. 317 U.S. 111 (1942).

51. 514 U.S. at 560.

52. *Id.* at 561.

53. See *Robertson*, 514 U.S. 669 (1995).

54. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) held that in general it is up to the political process to decide what are “integral state functions” and when states should be immunized from federal regulation under the Commerce Clause. What the federal government regulated in that case, a city-owned mass transit system, is clearly interstate commerce, and federal regulation did not single out

riod from 1937 through *Lopez*, no Justice on the Court ever proposed that the Court abdicate a judicial role. The Justices upheld federal regulations, sometimes over dissents,<sup>55</sup> but they never argued that the issue was a political question, like the decision to declare war, or the decision as to whether Congress has properly accepted a state's ratification of a constitutional amendment.<sup>56</sup>

Justice Souter would change all that, and reject both Justice Black's admonition and the Breyer dissent in *Lopez*. Souter urges judicial abdication, while simultaneously making the surprising claim that it is the majority that rejects precedent.<sup>57</sup> The Souter dissent also embraces a general federal police power that the courts (in his view) could not review, although the Framers and the representatives of the States at the time feared such a general police power. Because Breyer also joined the Souter dissent, one must assume that he too rejects his earlier opinion.

Souter's position was a surprise to the Solicitor General, who agreed that the commerce power has limits and that whether a matter falls within them is a decision for the Court. The Solicitor General, in another case that same term, argued that if the Commerce Clause allowed Congress to regulate "all activity that might have some indirect or remote downstream effect on interstate commerce," that would "improperly vest plenary power in the national government."<sup>58</sup> Later, he repeated

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the states for any special burdens. No Justice—in the majority or the dissent—argued that the question whether something is interstate commerce is not a judicial question. In fact, all nine Justices agreed that the matter being regulated is interstate commerce, the same conclusion that all nine came to in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which *Garcia* overruled. See Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657 (1987).

55. E.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal law governing extortionate credit transactions, a commercial crime, after reviewing congressional record; Stewart, J., dissented, arguing that the matter was not within the Commerce Clause).

56. See Ronald D. Rotunda, *Running Out of Time: Can the E.R.A. Be Saved*, 64 A.B.A. J. 1507 (1978).

57. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

58. Brief of the United States at 12, *Jones v. United States*, 529 U.S. 848 (2000) (No. 99-5739). *Jones* was another commerce clause case that the Court decided that same term, although this time the Court decided on statutory grounds, in order to avoid the Commerce Clause problem.

In *Jones*, Justice Ginsburg, speaking for the Court, reversed and held that, as a matter of statutory interpretation, "an owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i). Our construction of § 844(i) is reinforced by the Court's opinion in *United States v. Lopez*, and the interpretive rule that constitutionally doubtful constructions should be avoided where possible." 529 U.S. at 850-51 (internal citations omitted). See also *Scar-*

this refrain: "If Congress were authorized to regulate all activity that could theoretically have some distant downstream effect on interstate commerce, its powers would be effectively unlimited."<sup>59</sup> The Souter dissent rejects the Solicitor's position.

*Morrison* shows that the Court is serious about policing the commerce power. Congress still has considerable legislative power, but it will be more difficult for Congress to enact legislation that is "more appropriate to county commissions than to a national government."<sup>60</sup> The law in *Morrison* created a federal tort that almost duplicated the state tort; the primary difference between the two was that the federal tort was more difficult for the plaintiff to use because it required proof of gender-based animus.<sup>61</sup>

### CONCLUSION

The Framers created federalism not simply or primarily to protect the states but to protect the people. The Court's New Federalism should not be confused with the old states' rights federalism, because the New Federalism is about freedom, not about Jim Crow laws.

It is incorrect to conclude that *Morrison* shows that the present Court is deferential to the states. On the contrary, taken in context, it shows quite the opposite. During the same term that the Court decided this important federalism case, it also invalidated a state law that intruded on the parental relationship by mandating grandparents' visitation rights.<sup>62</sup> This same Court threw out state laws that interfered with federal power over international affairs<sup>63</sup> and motor vehicles.<sup>64</sup> The Court upheld federal privacy laws that regulated state motor vehicle departments

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*borough v. United States*, 431 U.S. 563 (1977), (holding that the Government must prove that a firearm previously traveled in interstate commerce in order to satisfy the required nexus between possession and commerce).

59. Brief of the United States at 41, *Jones* (No. 99-5739).

60. Former Acting Solicitor General Walter Dellinger, quoted in Mary Deibel, *Court Cutting Federal Role*, Chicago Sun-Times 35 (June 25, 1999).

61. The arson law in *Jones* also duplicated state laws. It did not authorize one extra dollar to hire more FBI agents to investigate residential arsons. States already criminalize arson and there was no suggestion that they needed federal help. If the law were interpreted to apply to residential arson, that interpretation would be largely symbolic; it would serve the purpose of convincing voters that the Federal Government was against arson.

62. *Troxel v. Granville*, 530 U.S. 57 (2000).

63. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

64. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

and placed upon them the same restrictions imposed on private parties.<sup>65</sup> The Court, in short, has shown that, when it is protecting civil rights and liberties, it is willing to override state law to meet that goal. The present Court is neither conservative nor liberal on federalism issues. If we must find a label, the most accurate one is libertarian because the Court invalidates laws, both state and federal, that interfere with our liberty.

This "New Commerce Clause" does not prevent the Federal Government from enacting any commercial regulation with which the states would be incapable of dealing and that would be necessary for a central government to enact. Indeed, *Morrison* and its predecessors do not overturn any prior case law. But the significance of these cases should not be underemphasized because they reinvigorate first principles.

Narrow majorities have decided these new Commerce Clause cases. Often when there is a string of five to four opinions, at least one Justice in the majority waivers in the steadfastness with which he or she adopts the legal principle. Not so in these cases. In all of them, the five-person majority—Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas and Kennedy—acts as one. These precedents herald a greater protection for the structure of the federal system and for the liberty that this structure protects.

Some people are concerned that this interpretation means that Congress cannot use section five of the Fourteenth Amendment to regulate private conduct and thereby "expand" civil rights. The concept of "expanding" human rights, like motherhood, apple pie, and the flag, sounds magnificent and wonderful. But it is like a knife that cuts both ways. If Congress could use such a power to expand some rights, it may do so by narrowing others.<sup>66</sup>

Moreover, except for *Morrison*, these cases limit the commerce power, not the section five power. The fact that an activ-

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65. *Reno v. Condon*, 528 U.S. 141 (2000).

66. It should not be difficult to draft creative legislation that recasts a simple dilution of one right as an expansion of another. A Congress bent on limiting desegregation, for example, would not simply enact a law authorizing states to establish racially segregated schools. Instead, the law might provide—in an effort to "expand" freedom of choice—that states should establish a variety of schools and allow people to transfer to their preferred schools, even if the result of such transfers meant that some schools became discriminatorily white or black. *City of Boerne* and its progeny prevent that result.

ity is not within the Commerce Clause does not mean that it is outside of the section five power.<sup>67</sup>

Federalism is important because it is one of the structural designs that the Framers created to help preserve our liberty. The Commerce Clause is also important not only because it gives Congress great power, but also because it grants that power within limits. Thus, the majority in *Morrison* embraced the important principle that Justice Black earlier articulated in *Heart of Atlanta Motel, Inc. v. United States*<sup>68</sup> — “whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>69</sup> In so doing, it soundly rejected Justice Souter’s novel and unprecedented argument that Commerce Clause limits are nonjusticiable.

Our federal structure is as old as our Constitution, but it is not outdated because it creates a framework that disperses power and increases liberty. If the people were angels we would not need a government, and if the governors were angels we would not need a Constitution. Alas, neither is true, so we need both.<sup>70</sup>

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67. *Morrison* did not create new law, for the Court had already held that section 5 of the Fourteenth Amendment only allows Congress to enforce section 1, and section 1 requires state action. Only two of the nine justices in *Morrison* argued that section of the Fourteenth Amendment could justify this law. See Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment after City of Boerne v. Flores*, 32 Ind. L. Rev. 163, 170 (1998).

68. 379 U.S. 241, 268 (Black, J., concurring).

69. *Id.* at 273.

70. James Madison said in *The Federalist Papers*: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficult lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *Federalist* 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 290 (Mentor, 1961).